

## STATEMENT OF THE ISSUES

### I. Scope of Review

- (1) *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 6, 575 N.W.2d 225, 228
- (2) *Thomas v. Custer State Hospital*, 511 N.W.2d 576, 579 (S.D.1994)
- (3) *Rapid City Educ. Ass'n v. Rapid City School Dist. No. 51-4*, 522 N.W.2d 494, 497 (S.D. 1994)
- (4) *Gul v. Center for Family Medicine*, 2009 SD 12, ¶ 7, 762 N.W.2d 629, 632-33

II. On the Facts: Did the Department commit error in: (1) Failing to construe the facts and the inferences in the light most favorable to Claimant as the nonmoving party; and (2) Improperly resolving genuine material issues of fact in a summary judgment proceeding; and (3) Failing to apply the presumption that when a worker who is in the course and scope of employment (as Claimant's Decedent has been stipulated to be), dies without a witness, the death is presumed to have "arisen out of employment"?

The ALJ, The Department, and The Circuit Court held in the negative but did not consider or apply the presumption.

#### A. Resolution of Factual Issues

- (1) *Steinberg v. South Dakota Department of Military and Veterans Affairs*, 2000 SD 36, ¶¶ 15, 23, 25, 27, 30, 607 N.W.2d 596, 602, 604, 605, 606

#### B. Failure to Apply the Presumption Created by the "Unexplained Death Rule"

- (2) *King v. Johnson Bros Construction Company*, 155 N.W.2d 183, 187 (SD 1967)
- (3) *Zamora v. Coffee General Hospital, et al.*, 290 S.E.2d 192 (Ga. App. 1982)
- (4) *Nettles v. Gulf City Fisheries, Inc.*, 629 So.2d 554, 557 (Miss. 1993)

III. On the Law: Did the Department commit error by mis-applying the correct legal test (or by applying an incorrect legal test) for "arising out of employment" under the but for" test as established by *Steinberg* and *Phillips* (which required determining whether or not the assault would have happened "but for" employment) or under the "incident to employment" test (*Grauel*)?

The ALJ, The Department, and The Circuit Court found in the negative.

- (1) *Anderson v. Hotel Cataract*, 17 N.W.2d 913, 915-17 (S.D. 1945)
- (2) *Fair v. Nash Finch Company*, 2007 SD 16, ¶¶ 9, 10, 728 N.W.2d 623, 628-29
- (3) *Phillips v. John Morrell & Co.*, 494 N.W.2d 527, 530 (S.D. 1992)
- (4) *Grauel v. South Dakota School of Mines and Technology*, 2000 SD 145, ¶ 12, 619 N.W.2d 260, 263